

No. 17,762

IN THE

**United States Court of Appeals
For the Ninth Circuit**

PAUL JOHN CARBO, et al., <i>Appellants,</i>
VS.
UNITED STATES OF AMERICA, <i>Appellee.</i>

**PETITION OF APPELLANT GIBSON
FOR A REHEARING**

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To the Honorable Stanley N. Barnes, Oliver D. Hamlin, Jr., and Charles M. Merrill, Circuit Judges, United States Court of Appeals for the Ninth Circuit:

Now comes the appellant, Truman Gibson, Jr., and respectfully urges the Court to provide a rehearing to reconsider his appeal from the judgment of the District Court of the Southern District of California entered on December 2, 1961.

In support of his petition for rehearing appellant Gibson shows to the Court the following:

I.

The section of the opinion of this Court entitled "The Factual Background" contains conclusions not warranted by the evidence in this case prejudicial to the appellant Gibson.

A. There is no evidence that the International Boxing Clubs (which are not parties to this proceeding) ever adopted any practice "of securing exclusive management agreements" through Carbo and Palermo or any other persons. There is certainly no evidence that Mr. Gibson was any party to any such arrangement. Mr. Gibson was not a party to *International Boxing Clubs v. United States*, 385 U.S. 242, so that conclusions there reached could not properly be deemed applicable to Gibson.

B. There is no evidence that Gibson "caused" payments to be made to Viola Masters. It is uncontradicted that these payments were directed by Mr. James D. Norris who was president of the International Boxing Clubs between 1954 and 1957.

C. The conclusions with respect to "the underworld" completely ignore, as does the remainder of the opinion, the numerous objections by the appellant Gibson to that line of questioning and the improper refusal of the trial court to require counsel for the government to define the term "underworld" though counsel for the government introduced the use of the term. Equally improperly, the district court forced the appellant Gibson to define the term which he did as meaning persons who had been convicted of serious crimes. This definition is apparently ignored by this Court in its opinion.

D. There is no evidence of "Leonard's vulnerability to economic pressure from Gibson."

E. The only evidence that "Gibson finally persuaded Leonard to call Palermo" was Leonard's own

testimony. Gibson denied this and the government's own evidence as to Leonard's call from Los Angeles to Philadelphia contradicted Leonard's testimony in that the call was made the day after Gibson left Los Angeles, not while he was there as Leonard testified, and was not made from the Ambassador Hotel as Leonard claimed, but was made from a drugstore a block away.

F. There is no evidence even on the basis of the only statements that Gibson was concerned about the welterweight title contrary to the conclusion contained in the Court's opinion.

G. There is no evidence that Leonard had received a beating and had been hospitalized. Actually even the Los Angeles Police Department publicly denied the truth of that assertion and Leonard did not dare to testify.

II.

The failure of the indictment to allege venue deprived the appellant Gibson of the means of a motion for change of venue. Thus the Court's conclusion that the failure of Gibson to move for a change of venue bars his raising the question demonstrates the insufficiency of the indictment.

III.

The only knowledge of any threats ascribed to Gibson is what Leonard told him after the threats allegedly had been made. Ironically, Leonard and Nesseth agreed that Gibson directed them to the law enforce-

ment authorities when he was told of threats. Under these circumstances, and on the Court's own reasoning, there should have been a reversal as to Count V with respect to Gibson as there was as to Sica and Dragna. Equally, the admission of Leonard and Neseth that Gibson originally assured them that their decisions need not be affected by threats of violence wholly belies his connection with the conspiracy charged in Count I.

IV.

The opinion implies that Gibson admitted the existence of business relations between himself and Carbo. In fact there was no such admission and there is no evidence of any such relationship between Gibson and Carbo.

V.

Gibson's suggestion of a Hart-Jordan fight as a means of solution of the financial difficulties of the Hollywood Boxing and Wrestling Club can not be regarded as "economic coercion." The Court's conclusion that these suggestions made Gibson a party to the conspiracy charged ignores the fact that the indictment did not so charge. There is no evidence of any connection of Daly with the Gibson proposal of a Hart-Jordan fight. Similarly, there is no evidence that Gibson authorized Daly to do any more than to try to assist Leonard in dealing with the problems of the Hollywood Boxing and Wrestling Club.

VI.

The Court's conclusions with respect to the "declarations of co-conspirators" are peculiarly prejudicial to Gibson. None of these statements was made in Gibson's presence. The district court refused to rule on the admissibility of such statements as to Gibson when they were offered and actually forbade objections based on this ground. The result of the views expressed by this Court is to deprive Gibson of elementary protections against hearsay and to deny to him a fair trial.

VII.

In considering "Sica's Underworld Reputation" the Court apparently gave no consideration to the obvious prejudicial effect of these allegations as to Sica's reputation in the indictment and the evidence in this regard on Gibson, a co-defendant. There was a similar disregard of the prejudicial effect of duplicate allegations and evidence as to Dragna.

VIII.

The cases cited by this Court in connection with the weight to be given to the uncontradicted evidence of Mr. Gibson's good character make it clear that it was not sufficient that the district judge only strongly suggested to the jury that it might find it improbable that a man of good reputation would commit a particular crime."

IX.

The reliance by this Court on the substantive counts in which Gibson was not charged as "overt acts at-

tributable to him on the two conspiracy counts" as justification for the denial of severance ignores the fact that the indictment did not charge those substantive acts as overt acts. Under these circumstances this Court's approval of denial of severance on that ground demonstrates that the denial of severance did in fact amount to the denial of a fair trial to Gibson because he was tried and convicted of offenses with which he was not charged.

X.

The Court apparently did not consider the prejudicial effect on Gibson of the instruction given by Judge Tolin to the jury with respect to the "agency" of Daly after the jury retired and when there was no opportunity for counsel to object to the instruction.

XI.

The combination of hearsay, statements of alleged co-conspirators, "underworld reputation," improper joinder, vague and confusing instructions, and limitation on the weight to be given the uncontradicted evidence of Gibson's good character combined to so effectively prejudice his defense as to deny him a trial in any real sense of the term.

XII.

In ruling on Gibson's attack on exclusion of Negroes from the jury this Court has ignored the fact that the district judge refused to permit the appellant to offer any proof to support the charge though it was tendered.

XIII.

The record does not support Judge Boldt's conclusion that the oral testimony of Leonard and Nesseth was duly and convincingly corroborated." In fact, as to Gibson the Leonard-Nesseth testimony was not only not corroborated, it was actually in conflict with other government evidence as well as uncontradicted evidence for the defense. Under these circumstances, the narrow view expressed by this Court as to the role of the successor judge denies appellant any judicial review of the sufficiency of the evidence after verdict. The protection intended for defendants in the concepts of "reasonable doubt" thus has been wholly denied to this appellant.

XIV.

The length of the trial, the size of the record, and the limitations imposed by the Rules of this Court on briefs and argument have so handicapped counsel for the appellant in advising this Court with respect to the wide variety of issues presented here that effective exercise of the appellate jurisdiction of this Court would be facilitated by a rehearing.

For all of the foregoing reasons appellant Gibson respectfully requests the Court to rehear and reconsider his appeal.

Dated, March 12, 1963.

Respectfully submitted,

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*Attorneys for Appellant and
Petitioner Gibson.*

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, March 12, 1963.

WILLIAM R. MING, JR.

*Of Counsel for Appellant and
Petitioner Gibson.*